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November 1, 2016

Office of the Secretary
Federal Maritime Commission
800 N Capitol Street NW, Room 1046
Washington DC 20573
Email: secretary@fmc.gov

Re: Yakov Kobel and Victor Berkovich Complainants vs.
Hapag-Lloyd America, Inc. et al
FMC Docket No. 10-06

Dear Secretary:

Please find enclosed for filing the original and five copies of Complainants' Response to Limco's Motion for an Order allowing reopening the time period for filing a notice of appeal in the above referenced case. Complainants object to this motion.

If you have any questions regarding this response please call or email me. Thank you for your assistance.

Very truly yours,



Donald P. Roach

DPR/dsh
cc: Clients
Alena Tokar
Wayne Rohde
Jonathan S. Cooper

FEDERAL MARITIME COMMISSION

YAKOV KOBEL and VICTOR BERKOVICH,

Complainants,

v.

HAPAG-LLOYD AMERICA, INC., LIMCO
LOGISTICS, INC., and INTERNATIONAL
TLC, INC.,

Respondents.

Docket No. 10-06

COMPLAINANTS' RESPONSE TO
RESPONDENT LIMCO'S MOTION
TO REOPEN THE TIME FOR FILING
NOTICE OF APPEAL

I

INTRODUCTION

Respondent Limco has filed a motion to reopen the time period to file a notice of appeal to the Federal Circuit Court of Appeals for the District of Columbia. This motion was apparently filed on October 26, 2016.

Complainants object to this motion to reopen the time to file a notice of appeal for the reasons set forth below.

II.

FACTUAL BACKGROUND

The following background and pertinent facts as set forth in the pleadings and orders on file with the Federal Maritime Commission (hereafter "FMC") activity log online are as follows:

1. The Order denying Limco's Motion for Reconsideration was filed on May 5, 2016 and served on that date.

2. The Order requesting Supplement Briefs regarding the Coble Act was filed and served on August 19, 2016.

3. Complainants' Supplemental Brief was filed and received by the FMC on September 16, 2016. A certificate of service by mailing by first class mail and email was

1 completed on September 16, 2016 and all parties, including Limco were served on that date.

2 4. A Notice of Extension of time for Limco to file a Response Brief was extended to
3 November 7, 2016. This notice was served on October 21, 2016. Limco's Response Brief
4 was initially due on October 11, 2016.

5 5. Limco filed a Motion to Reopen the Period for Filing a Notice of Appeal on
6 October 26, 2016. (This has not yet been recorded in the activity log.)

7 III.

8 ARGUMENT

9 A. Statutory and regulatory grounds for Motion.

10 The rules of procedure of the FMC as set forth in 46 CFR §502 et. seq. do not provide
11 any procedure for Leave to reopen the period for filing a notice of appeal. Likewise, the
12 Administrative Procedures Act does not provide any such remedy.

13 Limco relies on Federal Rules of Appellate Procedure (FRAP) 4(a)(6) for its authority
14 to reopen the period for filing a notice of filing an appeal. For situations not covered by a
15 specific FMC rule, the Federal Rules of Civil Procedure will be followed to the extent they
16 are consistent with sound administrative rules. 46 CFR 502.12 (Rule 12)

17 FRAP, Rule 4(a)(6) states in pertinent part:

18 “(6) **Reopening the Time to File an Appeal.** The district court
19 may reopen the time to file an appeal for a period of 14 days
20 after the date when its order to reopen is entered, but only if all
21 the following conditions are satisfied:

22 (A) the court finds that the moving party did not receive notice
23 under Federal Rule of Civil Procedure 77(d) of the entry of the
24 judgment or order sought to be appealed within 21 days after
25 entry;

26 B) the motion is filed within 180 days after the judgment or
order is entered or within 14 days after the moving party
receives notice under Federal Rule of Civil Procedure 77(d) of
the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.”
(Emphasis added.)

Moreover, Rule 4(a)(6) is discretionary and not mandatory. The court may exercise its

1 discretion only if all of the pre-conditions set forth in FRCP 4(a)(6)(A)(B) and (C) are met.

2 Strict compliance with these conditions is required.

3 Rule 4(a)(6) allows the District Court to grant relief if the specified requirements are
4 satisfied, but does not require the District Court to grant such relief, even if the requirements
5 are met. Thus, the abuse of discretion standards apply to the District Court's determination.
6 *In Re: Jones* 970 F.2d 36 (5th Cir., Texas, 1992).

7 Furthermore, FRCP 77(d)(2) provides that the time for filing an appeal is not affected
8 by lack of notice. This section specifically states:

9 “(2) Time to Appeal Not Affected by Lack of Notice. Lack of
10 notice of the entry does not affect the time for appeal or
11 relieve—or authorize the court to relieve—a party for failing to
12 appeal within the time allowed, except as allowed by Federal
13 Rule of Appellate Procedure (4)(a).”

12 Limco contends that the FMC was required to mail or email a copy of its order
13 pursuant to FRCP 5(b) (page 2 of Limco's Motion) and failed to do so. However, Limco is
14 required by 46 CFR 502.2(I), whereby the party has continuing obligation to provide contact
15 information to the FMC. A stipulation withdrawal of Limco's former counsel was received
16 on November 4, 2015 but did not disclose any contact information for Limco.

17 FRCP Rule 77(d) provides that the clerk must serve notice of entry (of an order or
18 judgment) as provided in FRCP 5(b) upon each party. However, a party may also serve notice
19 of entry of judgment as provided in 5(b).

20 In this case, the record in the FMC activity log shows that the Order denying Limco's
21 Motion for Reconsideration and the Order requiring Supplemental Briefs by the parties were
22 both served on all of the respective parties on the date reflected in the FMC activity log.

23 Furthermore, Complainants filed their Supplemental Brief pursuant to the August 19
24 Order and served all of the parties on September 16, 2016 as stated in the certificate of
25 service. Complainants' Supplemental Brief references the Order denying Defendant's Motion
26 for Reconsideration on pages one and two of that Brief. These references at the very least

1 placed Limco on notice of the entry of the Order denying its Motion for Reconsideration.
2 Thus the Complainants have given notice of entry of the order denying Limco's motion for
3 reconsideration pursuant to FRCP 77(d). Complainants' notice was given more than 21 days
4 as required in Rule 4(a)(6)(B). Complainants' Brief was served on Limco on September 16,
5 2016 and Limco's Motion was not filed until October 26, 2016, 40 days later.

6 It appears that the motion was barely filed within the 180 days after the order denying
7 reconsideration was entered on May 5, 2016. The motion was apparently filed on October 26,
8 2016 which is 174 from the date the motion was denied. However, Limco's Motion to Reopen
9 is more than 21 days after receiving notice of entry (40 days).

10 With respect to prejudice under Rule 4(a)(6)(C), Complainants have been prejudiced
11 because they have incurred additional costs and attorney's fees with respect to responding to
12 the FMC's order dated August 19, 2016 requesting supplemental brief. Furthermore,
13 Complainants' counsel agreed to extend the time for Limco to file its response brief to
14 Complainants' supplemental brief beyond the initial due date (October 11, 2016). Thus,
15 Complainants have taken action in reliance on the expiration of the normal period for filing
16 notice of appeal.

17 Finally, if Limco's Motion is granted it will further cause delay and protract this
18 proceeding which is now over six years in length.

19 B. Limco's factual contentions do not support grounds to reopen the period for filing
20 a notice of appeal.

21 First, Limco contends that it never received the Order Denying its' Motion for
22 Reconsideration from the FMC. However, this statement contradicts proof of service and the
23 FMC activity log for both the Order Denying the Request for Reconsideration and also the
24 Order Requesting Supplemental Briefs.

25 Second, the Order Requesting Supplemental Briefs served on 8/19/2016 also makes
26 reference to the Order denying Limco's Motion for Reconsideration on May 5, 2016.

1 Third, Limco could have at any time checked the status of the case and, in particular,
2 whether or not the Motion to Reconsider was granted or denied by simply accessing the
3 website with the FMC.

4 Fourth, Limco's Affidavit by Michael Lyamport does not state when or how he
5 learned of the order denying Limco's Motion for Reconsideration. As stated above, Limco
6 knew or should have known of the Order Denying the Motion for Reconsideration at the very
7 latest on September 16, 2016 when he received Complainants' Supplemental Brief.

8 In *Kuhn v. Sulzer Orthopedics* 498 F.3d 365 (6th Cir. OH 2007) the Appellate Court
9 held that the District Court did not abuse its discretion in denying a plaintiff to reopen the
10 time for filing an appeal when counsel opted not to register the email address with the case
11 management/case filing system and failed to monitor the electronic docket. See also
12 *Communs Network Ltd. v. MCI Worldcom Communs, Inc.* 708 F.3d 327 (2nd Cir. 2013).

13 Furthermore, Limco contends that it did not determine that Limco was omitted from
14 the FMC list service until October 12, 2016, when in fact, it had already filed a motion for an
15 extension of time to file a responding brief to Complainants' Supplemental Brief. Limco
16 should be estopped to now seek a Motion to Reopen to file a Notice of appeal when it
17 previously sought and was granted relief for an extension of time to respond to the Coble Act
18 and attorney's fees.

19 Limco should not be granted this extraordinary relief it seeks because of its
20 carelessness, neglect or inattention to the case. Limco has had four different attorneys since
21 the beginning of this case. Limco was without counsel apparently from November 2015 to on
22 or about October 12, 2016 and apparently representing itself and thereby assumed the risk for
23 missing any deadlines or failing to monitor the status of the case.

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1 IV.

2 **CONCLUSION**

3 Limco has failed to meet the statutory preconditions for consideration of a motion to
4 reopen the period for filing an appeal. Limco has failed to meet conditions in Rule 4(a)(6)(B)
5 by not filing a motion within 21 days after receiving notice of entry of the Order from
6 Complainants in their Supplemental Brief. Additionally, Complainants are prejudiced by this
7 Motion pursuant to Rule 4(a)(6)(C) and acted in reliance that the period for filing an appeal
8 had expired.

9 Moreover, even if the FMC finds that Limco has met the preconditions, the FMC
10 should not exercise its discretion to grant this extraordinary relief as requested in this Motion
11 based upon the other factors set forth in this response.

12 Based upon the foregoing reasons, Limco's motion for leave to reopen the period of
13 notice for filing appeal should be denied.

14 Dated this 1st day of November, 2016

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17 Donald P. Roach, OSB 75317
18 Attorney for Complainants
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FEDERAL MARITIME COMMISSION

YAKOV KOBEL and VICTOR BERKOVICH,

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HAPAG-LLOYD AMERICA, INC., LIMCO
LOGISTICS, INC., INTERNATIONAL TLC, INC.,

Respondents.

Docket No. 10-06

CERTIFICATE OF MAILING

On the 1st day of Novembre, 2016, I mailed true and correct copies of the foregoing
COMPLAINANTS' RESPONSE TO RESPONDENT LIMCO'S MOTION TO REOPEN
THE TIME FOR FILING NOTICE OF APPEAL, to the following addresses via email and
first class mail as follows:

Limco Logistics, Inc. and International TLC at the following addresses:

International TLC
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Dated this 1st day of November, 2016.

Respectfully submitted:



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